

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DENISE KELLY,

Plaintiff,

v.

SAP AMERICA, INC.,

Defendant.

Civil Action No. 02-CV-2955

DEFENDANT SAP AMERICA, INC.'S MOTION FOR SUMMARY JUDGMENT

Defendant SAP America, Inc. ("SAP America") hereby moves that this Court grant summary judgment in its favor. In support of its Motion for Summary Judgment, SAP America states as follows:

1. On March 20, 2001, *pro se* Plaintiff Denise Kelly wrote and sent an e-mail to the CEO of her employer, SAP America, comparing SAP America employees to used condoms and dead soldiers. As a result of Ms. Kelly's gross misconduct, SAP America terminated her employment effective March 23, 2001. Notwithstanding, Ms. Kelly filed this action, claiming that SAP America violated the Family and Medical Leave Act, 29 U.S.C. §§ 2601 et seq. ("FMLA").¹

¹ On October 11, 2002, Ms. Kelly filed a second amended complaint (hereafter "Second Amended Complaint"). The Second Amended Complaint contained various claims which, with the exception of Ms. Kelly's FMLA claim, this Court subsequently dismissed by order dated January 28, 2003.

2. Ms. Kelly alleges that SAP America violated the FMLA in two ways. First, she claims that SAP America violated the FMLA by refusing to restore her to her position (or an equivalent position) upon returning from medical leave. (Pl 2d Am. Compl. ¶24). Second, Ms. Kelly claims that SAP America violated the FMLA by allowing a co-worker to “interrupt” her treatment plan by calling her at home, allegedly to gather office gossip. (Id.).

3. Ms. Kelly’s FMLA claims are entirely without merit. Regarding her claim for allegedly failing to restore her to her position, Ms. Kelly did not have a right to her job at SAP America because she engaged in misconduct which justified her employment termination. SAP America terminated Ms. Kelly’s employment because she sent an extremely inappropriate e-mail to SAP America’s CEO, which SAP America deemed to be insubordinate, disrespectful and in violation of Company policy. Ms. Kelly has not adduced any evidence which even tends to show that SAP America’s termination decision was for any other reason. Accordingly, she is not entitled to her position or any other position at SAP America.

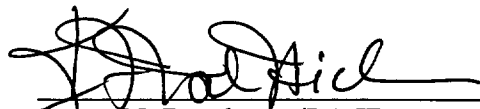
4. Turning to Ms. Kelly’s claim that SAP America interfered with her FMLA rights, it similarly fails. The undisputed record facts demonstrate that no one interfered with Ms. Kelly’s ability to exercise her FMLA rights. Put simply, while Ms. Kelly may not have appreciated a co-worker calling her at home while on FMLA leave, that does not establish a violation of the FMLA.

5. Finally, to the extent that Ms. Kelly’s allegations encompass a claim of discrimination or retaliation under the FMLA, Ms. Kelly has not provided any evidence that SAP America discriminated or retaliated against her. The undisputed evidence shows that SAP America would have terminated Ms. Kelly’s employment based on her inappropriate conduct

regardless of whether she was on FMLA leave at the time. Consequently, she does not possess a viable claim under the FMLA.

WHEREFORE, for all of the foregoing reasons and those contained in the Memorandum in Support of Defendant SAP America, Inc.'s Motion for Summary Judgment, this Court should grant SAP America Inc.'s Motion and dismiss Plaintiff's Second Amended Complaint with prejudice in its entirety.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Boudreau", is written over a horizontal line.

James N. Boudreau (PA ID
Kristin Malone-Hicks (PA ID 80370)
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Dated: July 17, 2003

Attorneys for SAP America, Inc.

CERTIFICATE OF SERVICE

I, M. Kristin Malone-Hicks, hereby certify that a true and correct copy of the foregoing SAP America Inc.'s Motion for Summary Judgment, was served by first class mail this 17th day of July, 2003, upon the following:

Ms. Denise Kelly
15 North Elm Avenue
Newtown, PA 18940


M. KRISTIN MALONE-HICKS